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LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

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Immigration

New I-9 Form Released

The U.S. Citizenship and Immigration Services (USCIA) has just released a new I-9 Form and "Handbook for Employers, Instructions for Completing the Form I-9." Employers are encouraged to begin using the new form now although the effective date has yet to be published in the Federal Register. Failure to use the new Form I-9 after the effective date may result in penalties. Enforcement is also expected to be increased with the implementation of the new form. The basic Form I-9 remains substantially the same with the most significant changes being made to the instructions and changes to documents that may be accepted. A copy of the new form can be found at www.uscis.gov/files/form/I-9.pdf and the handbook can be found at www.uscis.gov/files/nativedocuments/m-274.pdf

New Social Security No Match Letter Rule Barred Indefinitely

Due to a technicality, a federal district court judge blocked the Department of Homeland Security's final rule aimed at employers with inadequate documentation of their workers. It seems the government inadequately documented the reasons for its policy change! The injunction is not final and may be lifted if the DHS corrects its error.

New Florida Legislation

Florida's Minimum Wage Increase January 1, 2008

Pursuant to the constitutional amendment approved by voters in 2004, the minimum wage will increase to $6.79 on January 1, 2008. This represents a 12-cent per hour increase. Federal minimum wage continues to be less than the state's minimum wage, so employers must follow state law when paying employees. Employers of tipped employees

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may continue to count tips actually received as wages under the Federal Fair Labor Standards Act. Tipped employees must be paid $3.77 per hour effective January 1, 2008. Florida's minimum wage poster is available for downloading at www.floridajobs.org/resources/fl_min_wage.html

Discrimination

No Harassment Found

An employee claimed she was sexually harassed over the course of 22 months because she was subjected to two inappropriate sexual comments by coworkers and two inappropriate touching incidents. The Court explained that two risqué comments and two incidents of buttocks-touching over 22 months did not establish a severe or hostile work environment for the employee. Quoting the U.S. Supreme Court in *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23 (1993), the Appeals Court said that there are four factors to consider in determining whether harassing conduct is sufficiently severe or pervasive to alter an employee's terms or conditions of employment: (1) the frequency of the discriminatory conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating or merely an offensive utterance; and (4) whether the conduct unreasonably interferes with an employee's work performance. In a prior case before the Court it found that no harassment occurred over the course of six or seven months when a male supervisor repeatedly called a subordinate at home, once complimented her appearance, twice stared at her, once placed his hand on her knee, once touched the hem of her dress, once touched her ring and bracelet, and repeatedly asked her out to lunch. The court said that, while the conduct was perhaps annoying or inappropriate, it was not sufficiently serious to support a sexual harassment claim. Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment. *Dar Dar v. Associated Outdoor Club, Inc.,* 2007 U.S. App. LEXIS 21795 (11th Cir. 9/7/07)

Family Medical Leave

Employer Legally Rejected Employee's Medical Certification

An employer rejected three medical certifications submitted by an employee, denied her leave for an alleged back injury, and finally discharged her for excessive absenteeism under its no-fault attendance policy. The rejected medical certifications occurred when the employee failed to establish a serious health condition. The certification she offered did not contain required information and the doctor had not examined her in over six months. The second was not authentic because it was completed by the doctor's assistant without the doctor's knowledge. And the third merely reported information the employee relayed. The court said that the employer's failure to require a second opinion did not preclude it from challenging the validity of the employee's condition because the second opinion language in the Family Medical Leave Act is merely permissive. *Novak v. Metrohealth Medical Center,* No. 06-0306 (6th Cir. 9/28/07).

Fair Labor Standards Act

Improper Salary Docking Causes Employer to Lose Exemption

An employer routinely docked the wages of otherwise overtime-exempt employees. Five employees sued. The court ruled that the employer's pay-docking policy and practice failed to satisfy the salary basis test necessary to classify employees as exempt

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from overtime under the Fair Labor Standards Act. Under the "white collar" exemptions, employees whose duties meet the test for executive, administrative or professional can be considered exempt if they are paid "on a salary basis." This means the employee must receive the same pay each pay period without deductions for partial day absences, among other things. In this case, the employee handbook contained a progressive discipline policy that included suspensions for personal phone calls, tardiness, and dress code violations. Evidence of at least 12 instances where the employer docked the pay for such violations caused the employer to lose the exemption for these employees. *Ergo v. International Merchant Services,* No. 04 C 6789 (N.D. Ill. 9/13/07).

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